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Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

PATRICIA STEPHENS,

Petitioner,

v.

COUNTY OF ALBEMARLE, VIRGINIA; CITY OF CHARLOTTESVILLE; RIVANNA SOLID WASTE AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case where the government has imposed upon third-party litigants, as a condition of settlement of litigation, the forfeiture of their future speech about landfill safety hazards, including speech before regulatory agencies, does a neighbor living in close proximity to the landfill have standing to challenge the suppression of this speech when she has shown the existence of willing speakers?

2. If a necessary element for standing to vindicate violation of the right to receive information is now to include proof not only of the existence of a willing speaker but also that the willing speaker had in the past individually spoken to the plaintiff on the subject or would do so in the future, and the issue was raised *sua sponte* by the court of appeals, should the plaintiff not be given an opportunity to prove this newly-imposed element?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Patricia Stephens on her own behalf and on behalf of the estate of her husband, Wayne Stephens.

Defendants-Appellees and Respondents: County of Albemarle, City of Charlottesville, and Rivanna Solid Waste Authority, an independent governmental entity controlled jointly by County of Albemarle and City of Charlottesville.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 524 F.3d 485 (4th Cir. 2008), and included in the Appendix at pages 1a-19a. The final ruling of the District Court for the Western District of Virginia is unpublished and is included in the Appendix at pages 20a-28a. The unappealed ruling of the District Court, which found Plaintiff had standing, is unpublished and is included in the Appendix at pages 30a-51a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The opinion and judgment of the Fourth Circuit was entered on May 9, 2008. No petition for rehearing was filed. The present petition is filed within ninety days thereof.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article Three, Section Two: The judicial power shall extend to all cases, . . . arising under this Constitution. . . .

United Stated Constitution, Amendment One: Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition its government for redress of grievances.

United States Constitution, Amendment Fourteen: . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Albemarle County and the City of Charlottesville jointly operate the Rivanna Solid Waste Authority, a separate governmental entity under Virginia law [hereinafter "the governments"], which have operated for some years a landfill near the town of Ivy, Virginia. In 1998, a number of neighbors of the landfill, many of whom had been outspoken to the point of erecting billboards and creating websites about the landfill's hazards, filed suit against these entities alleging various contaminations, pollutions, and other harm from the landfill. In late 2002, the parties were divided and entered into the two separate settlements of the lawsuits under each of which the defendants provided certain benefits to these neighbors[1] but in exchange for which the neighbors not only had to drop their litigation but, in addition, had to forfeit, in the case of one agreement for the rest of time, any speech whatsoever to anyone or any entity, including the EPA, concerning safety matters surrounding the landfill.

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[1] As to one set of plaintiffs, the governments agreed to guarantee safe drinking water; as to the other group, to buy the home alleged to have been contaminated.

The agreement barring all speech for the rest of time was imposed against Mr. Booth (the "Booth agreement"), who was described in testimony in the record as the most knowledgeable neighbor concerning the landfill's hazards. This particular settlement agreement was placed under seal by the United States District Court for the Western District of Virginia.

The speech ban in the other agreement (the "Burke agreement," so named for the first named plaintiff thereunder) provided a somewhat less sweeping ban on safety speech to last only so long as the landfill sought expansion.

The plaintiffs subject to each agreement have testified in this litigation that they resented this imposed ban on speech and, but for the ban, continued to want to speak out on certain issues about the landfill. However, they were each afraid of losing their respective benefits.

Patricia Stephens and her husband Wayne were at all relevant times also neighbors of the landfill and of the Booth and Burke Plaintiffs who had entered into these agreements. Wayne in fact worked at the landfill until his death from a "serious" OSHA violation at the landfill the year after these agreements.

On October 1, 2004, Plaintiff brought suit under 42 U.S.C. §1983 in the Western District of Virginia on behalf of herself and her husband's estate, seeking primarily to have the settlement agreements declared unconstitutional as having infringed and continuing to infringe the right to receive safety information about the landfill. In the course of the litigation, in March

2006, she succeeded in having the Booth agreement unsealed.

On April 18, 2007, the district court held that, though Plaintiff had standing to vindicate the violation of her and her husband's right to receive information, the governments' actions vis-a-vis the neighbors in silencing them did not violate the constitution, because, as to the Booth agreement, the court held, the government did not grant a recognizable benefit for purposes of the unconstitutional conditions doctrine, and, as to the Burke agreement, the court held that speech was not sufficiently infringed.

Plaintiff timely appealed to the Fourth Circuit. On May 9, 2008, the court vacated the district court's decision. It did not address either of the two holdings of constitutionality by the district court. Instead, it held *sua sponte* that Plaintiff had no standing to bring the claim in the first place because, it opined, Plaintiff had not shown that she or her husband had, prior to the silencing agreements, specifically sought safety information from her silenced neighbors. (A-16a)

REASONS FOR GRANTING THE WRIT

Introduction

In this First Amendment decision, the Fourth Circuit, departing from precedent in this Court, standing at odds with decisions in other circuits, and acting *sua sponte*, has added on a novel standing requirement for redressing a violation of the First Amendment right to receive information which requirement is so overly restrictive that few if any

plaintiffs will ever meet it. This leaves such governmental actions as those by Defendants in this case largely beyond the review of federal courts. The Court should take this case not only to reconcile the inconsistent jurisprudence regarding standing in the right-to-receive context but to reverse this decision which amounts to a *de facto* removal in the Fourth Circuit of the right to receive altogether.

I. The holding below is not only at odds with the holding in other circuits on standing in right-to-receive cases but has narrowed standing so tightly as often to do away with vindication of the right altogether.

In *Virginia State Bd. of Pharmacy v. Virginia Consumer Council,* 425 U.S. 748 (1976), this Court discussed First Amendment protection of the right to receive information of public concern and held that a statute which prohibited publication of pharmacy prices, given that there were pharmacies who otherwise would publish such information ("willing speakers"), violated the public's right to know. The Court did not impose any additional requirement of proof that some specific pharmacist had ever in fact spoken to some specific plaintiff in the past about the prices in order to grant plaintiffs relief.

Following *Virginia Pharmacy,* a number of circuits have applied its analysis to other right-to-receive cases. In these decisions, as well that by the district court below, but quite unlike the Fourth Circuit's subsequent decision vacating the matter, the question

of standing turned on the existence *vel non* of willing speakers.[2]

Thus, the Second Circuit, in the right-to-receive case of *In Re Application of Dow Jones & Company, Inc.*, 842 F.2d 603 (2d Cir. 1988), found that news organizations had standing because there were willing speakers. There was no requirement that the plaintiffs *also* establish that the speakers had in fact spoken to them in the past specifically about this matter. *Id.* at 607-08.

Similarly, the Third Circuit concluded that a potential recipient of speech had standing to raise a First Amendment challenge to a gag order by looking solely to whether otherwise willing speakers existed. Again there was no requirement that the plaintiffs prove that those speakers had in fact spoken or planned to speak in the future to the specific plaintiffs about the specific matter. *See FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (3d Cir. 1996). As the court observed, "[C]ourts have found that third parties have standing to challenge a gag order only when there is reason to believe that the individual subject to the gag order is willing to speak and is being restrained from doing so. . . . Our cases are consistent with this view." *Id.* at 838-39.

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[2] Even in *Virginia Pharmacy*, there was a degree of presumption even as to the willing speaker requirement, no doubt in part because of the importance of the First Amendment right being protected.

Similarly the D. C. Circuit, in *Taylor v. Resolution Trust Corporation*, 56 F.3d 1497 (D.C. Cir. 1995), acknowledged standing of a would-be recipient of speech upon proof of the existence of speakers who would be willing to speak but for the restriction. The court stated, "[W]e agree with [plaintiff] that it has a First Amendment interest in receiving information from willing speakers . . . sufficient to support its standing to bring a constitutional challenge. Where a speaker exists, . . . the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both." *Id.* at 1508 (quotations omitted).

Not so in the Fourth Circuit, which has now fashioned an unprecedented and far more restrictive analysis for standing. While accepting that there were willing speakers (A-15a, 16a), and sidestepping whether the conditions imposed to silence the speakers were constitutional, the court held that Plaintiff had not *also* proved that she had previously talked with the would-be speakers about the specific matters nor that the speakers made plans to do so with Plaintiff in the future. (A-16a). "Ms. Stephens has not, however, offered any indication that these willing speakers would have discussed the landfill with her and her husband in the past or that they would presently discuss the landfill with *her* if they were not constrained . . . " 524 F.3d at 492 (A-16a)(emphasis added). Because Plaintiff failed this new requirement, the court held, there was no standing, and the matter was vacated.

This reasoning is not only unprecedented but misperceives the right at stake. Particularly when a speaker would speak on matters of public concern such

as, in the present case, matters of public health and safety, the speaker is speaking to anyone whose common interests make him a listener. The protected information is, by definition, of *public* interest. And in the same way that a speaker does not have to establish that anyone was listening in order to establish a First Amendment right to speak, a recipient does not have to establish that someone was planning to speak personally to him in order at least to have standing to protect the First Amendment right to receive. Any number of people in a community whose health is at stake would likely be quite interested in what a speaker has to say.

Morever, those who are uneducated on a matter of public concern and thus who do not know the importance of what it is they cannot hear are not only protected recipients but arguably even more important ones. It is to them that the speech holds its greatest import. To limit, as the Fourth Circuit has done, the First Amendment's protection only to those people who had already had a one-on-one dialogue about dangers they did not yet know about or could prove they would have such a discussion about the unknown in the future, defeats the whole purpose of the right to receive, in essence overturns *Virginia Pharmacy,* and rubs the right to receive right out of the First Amendment. Governments can now, in the Fourth Circuit, coerce speakers into silence on any subject whenever they wish and there is likely to be no one who can protest.

II. Even if standing for vindicating violations of the right to receive should now be narrowed, Plaintiff and her husband are at the core of those who could possibly have such standing.

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court famously stated:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn . . . As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

413 U.S. at 611-612 (citations omitted). Thus, notions of standing have been applied more broadly in the First Amendment context than in other contexts.

Yet now the Fourth Circuit has gone in the polar opposite direction and applied such an overly constrictive standing requirement upon the ability to vindicate First Amendment rights as to squeeze away

the possibility of any judicial review at all in most right-to-receive cases. As discussed below, Plaintiff is at the core of potential plaintiffs under any reasonable analysis including, as discussed in Section Three, under *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). It is established fact that she lived in close proximity to the landfill and was therefore a probable recipient of its pollution. It is her health and safety, and was that of her husband as well, which made their right to receive this safety information so important and the suppression so offensive. Moreover, her husband even worked at the landfill. If there were dangers there, they both have had the right to know of them, and the government, in silencing those in the know, violated their rights to receive this speech.

What is more, the facts suggest there exists no person who could have greater standing than the Plaintiff. Thus, if Plaintiff does not have standing, then no one has standing, and the Fourth Circuit's holding serves to insulate from any judicial review governmental coercion against speech even on matters of great public concern, placing such suppression of a First Amendment right in an unprecedented, impregnable bubble.

III. Plaintiff has both Article III and prudential standing; she personally suffered an invasion of a protected legal interest as a result of Defendants' actions, which invasion would be redressed by a favorable decision, and which invasion involves the First Amendment.

A. The facts establish the *Lujan* elements for Article III standing.

As set forth in *Lujan,* in order to establish Article III standing (as opposed to "prudential" standing, discussed below), a plaintiff must establish three elements: 1) that she suffered an invasion of a legally protected interest; 2) that there is a causal link between the invasion and the conduct by defendant complained of; and 3) that the invasion will likely be redressed by a favorable decision. *Id.* at 560-61. The Fourth Circuit quoted this analysis, then utterly abandoned it. As set forth below, each of these elements is met in this case.

As the district court correctly ruled, Plaintiff had a right to receive the safety information at issue which right was, *if* the ban on speech here were unconstitutional, violated by Defendants' actions, and, *if* the ban were declared unconstitutional, this case would redress that injury. As the district court also correctly analyzed (A-42a-46a), Plaintiff's legally protected interest, namely, the right to receive the banned information, was invaded by Defendants' actions.

The primary function of the First Amendment right of free speech is to protect a free exchange of ideas. *E.g., Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 573-574 (2002) So understood, the First Amendment has *always* included the right not just of the speaker to give out information but of the potential receiver to receive it. As this Court has set forth succinctly,

> [T]he protection afforded is to the communication, *to its source and to its recipients both*. This is clear from the decided cases. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech "'necessarily protects the right to receive.'"

Virginia Pharmacy, 425 U.S. at 756-57 (1976)(notation omitted)(emphasis added). It is this right, the right to receive information and assure an informed public, that has been described as a safeguard against "misgovernment." *See Grosjean v. American Press Co.,* 297 U.S. 233, 250 (1936). *See also Procunier v. Martinez*, 416 U.S. 396, 408-409 (1974)("Both parties to the correspondence have an interest in securing that result, and censorship . . . necessarily impinges on the interest of each."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)("It is the right of the viewing and listening public, and not the right of the broadcasters, which is paramount.").

Accordingly, Plaintiff has a First Amendment right to receive such safety information (*Lujan* element one), and the governments' actions directly violated that right by silencing that information (*Lujan* element two), which violation would be redressed in this case if successful (*Lujan* element three).

B. Plaintiff has not only Article III standing but also "prudential" standing.

In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), this Court recognized two "strands" of standing. One, Article III jurisdictional standing, is analyzed by *Lujan*. *Id.* at 11. The other, called "prudential" standing, is court-fashioned, *i.e.*, not Article III based, and has been applied in those areas in which the federal system has typically declined to interfere, such as in the area of domestic relations. *Id.* at 11-12.[3]

Plaintiff not only has "prudential" standing, but all prudence would counsel that Plaintiff *must* have standing. Indeed, as discussed above, she would arguably be one of the only members of a limited class who could challenge such an unconstitutional condition. Given that the uncontradicted evidence in the record establishes that the silenced speakers are fearful of losing important governmental benefits

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[3] Since questions of "prudential" standing do not derive directly from Article III, they are presumably waivable. In the present case, Defendants did not appeal the district court's decision granting standing or raise the issue on appeal. The court of appeals raised the issue *sua sponte*.

should they speak out, including by challenging the ban, those other neighbors being deprived of safety information such as Plaintiff represent the very core of those with standing to protect this First Amendment right to receive information. Without it, governments could silence safety speech in this and future cases with impunity.

Given the broad cushion of protection which the Court has always given First Amendment rights, in particular regarding matters of political discourse and public safety, it is not only jurisprudentially unsound but dangerous for the Fourth Circuit to hold that Plaintiff did not have standing to vindicate violation of her right to receive safety information because she had not shown she had personally spoken to the willing speakers about these safety matters before they were silenced.

Plaintiff has alleged an injury in fact, violation of her own right to receive safety information. Prudence, as well as jurisprudence, counsel that Plaintiff, and those who may be similarly situated in the future, have standing to vindicate this important right.

CONCLUSION

For the reasons discussed above, the Court should grant the writ to restore the right to receive information in the Fourth Circuit which the court of appeals has *de facto* repealed, and to reconcile the holdings among the circuits on this important issue; alternatively, the case should be remanded to allow plaintiff an opportunity to meet this new standing requirement which the court of appeals imposed *sua sponte*.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1478

[Filed May 9, 2008]

PATRICIA STEPHENS,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
COUNTY OF ALBEMARLE, VIRGINIA;	)
CITY OF CHARLOTTESVILLE; RIVANNA	)
SOLID WASTE AUTHORITY,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Western District of Virginia,
at Charlottesville.
Norman K. Moon, District Judge.
(3:04-cv-00081)

Argued: March 18, 2008

Decided: May 9, 2008

Before Sandra Day O'CONNOR,
Associate Justice (Retired),
Supreme Court of the United States,
sitting by designation,
WILLIAMS, Chief Judge, and
HAMILTON, Senior Circuit Judge.

Vacated and remanded by published opinion. Chief Judge Williams wrote the opinion, in which Associate Justice O'Connor and Senior Judge Hamilton joined.

COUNSEL

ARGUED: Deborah Chasen Wyatt, WYATT & ASSOCIATES, P.L.C., Charlottesville, Virginia, for Appellant. Alvaro Antonio Inigo, ZUNKA, MILNOR, CARTER & INIGO, LTD., Charlottesville, Virginia, for Appellees. **ON BRIEF:** Richard H. Milnor, ZUNKA, MILNOR, CARTER & INIGO, LTD., Charlottesville, Virginia, for Appellees.

OPINION

WILLIAMS, Chief Judge:

After Patricia Stephens's husband, Wayne Stephens, died in an explosion at a landfill near Ivy, Virginia, she brought this action under 42 U.S.C.A. § 1983 (West 2003 & Supp. 2006) against the landfill's operators—the County of Albemarle, the City of Charlottesville, and the Rivanna Solid Waste

Authority ("RSWA")[1] (collectively "Appellees"). Ms. Stephens claims that two settlement agreements between Appellees and third-parties unconstitutionally conditioned government benefits on the relinquishment of the third parties' First Amendment rights to speak freely about the landfill, thereby depriving her and her husband of their First Amendment rights to receive information. She further claims that this violation proximately caused Wayne Stephens's death.

The district court granted summary judgment in favor of Appellees, reasoning that the settlement agreements did not make any government benefit contingent on the surrender of First Amendment rights. We conclude, however, that because Ms. Stephens, both individually and as her husband's personal representative, lacks standing to pursue her claims, the district court was without subject-matter jurisdiction to consider the merits of her claims. We therefore vacate the judgment of the district court and remand for dismissal of Ms. Stephens's case.

I.

This appeal is from the district court's grant of summary judgment in favor of Appellees, so we review the facts in the light most favorable to Ms. Stephens. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (noting that all evidence must be construed in

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[1] The Rivanna Solid Waste Authority ("RSWA") is a distinct governmental entity jointly operated by the County of Albemarle and the City of Charlottesville.

the light most favorable to the party opposing summary judgment).

Ms. Stephens resides in the area of Albemarle County, Virginia known as Ivy, near the landfill operated by Appellees. Her husband, Wayne, worked as the landfill's manager until April 10, 2003, when a cutting torch that he was using to cut old oil storage tanks for resale as scrap metal sparked an explosion, killing him. Cutting fuel tanks in this manner was a serious violation of the regulations of the Occupational Safety and Health Administration ("OSHA"). OSHA cited the RSWA for six separate serious violations in connection with the explosion. These failings, however, do not represent the basis for the present litigation, which focuses instead on Appellees' actions several years earlier, when a number of Stephens's neighbors raised concerns about the landfill's environmental impacts.

In the mid-1990s, plans to maximize the amount of trash that could be put into the landfill spurred a number of individuals living near the landfill to form a citizens group called the Ivy Steering Committee (hereinafter the "Committee"). Concerned primarily about water and air pollution from the landfill, Committee members educated themselves "about the issues at the landfill" and met, usually on a weekly basis, to discuss those issues. (J.A. at 207.) On a number of occasions, Committee members relayed their concerns to regulatory agencies, at one point writing letters to the Environmental Protection Agency ("EPA") and writing many letters to the Virginia Department of Environmental Quality. Committee members also wrote letters to the RSWA,

and some members, particularly David Booth and Ed Strange, often called the RSWA to voice concerns. The Committee did not make public the minutes of its meetings. It did, however, maintain a website and erected a billboard with a "Mr. Yucky face"- style design that was related to issues of water pollution.

The Stephenses were not members of the Committee and did not attend the meetings. In the course of this lawsuit, Ms. Stephens has, however, gathered information through discovery regarding the group's discussions. One member, Ed Strange, stated that although the concerns discussed "most often involved water and air pollution, . . . discussions were by no means limited to these concerns and in fact covered virtually any activity taking place at the landfill." (J.A. at 274.) Another member, Daniel Burke, agreed that the discussions could extend to, for example, worker safety, explaining that if anyone in the Committee knew about a practice that endangered the life or safety of an employee at the landfill, it would definitely have come up in the meetings. Burke did not, however, remember discussing any worker-safety concerns that were not coextensive with the Committee members' own concerns about water and air quality. He explained that, before learning of Wayne Stephens's death in the newspaper, he personally did not have any misgivings about this aspect of the landfill's operations, as he had "no reason to . . . believe that they weren't professional at burying trash." (J.A. at 246.)

In 1998, the Committee, dissatisfied with the results of its calls and letters, instituted a lawsuit against Appellees. In *Weber v. RSWA*, 3:98cv0019

(W.D. Va. 1998), twenty-four plaintiffs, including individuals living near the landfill as well as the St. John the Baptist Episcopal Church and the Peacock Hill Water Authority, alleged that the landfill was contaminating the surrounding air and water, in violation of federal and state environmental statutes and state nuisance law. Appellees settled the *Weber* lawsuit with all but four of the plaintiffs by entering into two separate settlement agreements in 2000.

Appellees entered into one of the settlement agreements (the "Booth Agreement") with David and Maureen Booth, whose 26-acre property abutted the landfill. Pursuant to the Booth Agreement, Appellees agreed to purchase the Booths' property. The Booths, in exchange, agreed to, among other things, release their claims against Appellees and sign two letters withdrawing complaints they had made about the landfill to regulatory agencies. Of particular relevance to this appeal, the Booth Agreement also provided that:

> The Booths, to the extent that they have control over such matters and to the extent possible, agree to remove the Ivy Steering Committee website and any language or images from any personal websites and billboards, from the public domain which deal with any of the matters raised in the Action or with respect to the Ivy landfill. Further, the Booths will cease opposition to the Ivy landfill and any further permits for which it may apply, will refrain from directly or indirectly opposing the landfill or permitting, will make no further private or public adverse comments about the landfill, and

> will not engage or solicit from others any opposition to or legal action opposed to said landfill or its permitting process.

(J.A. at 57-58.)

Another settlement agreement, the "Burke Agreement," covered the remaining settling plaintiffs. In the Burke Agreement, Appellees agreed to modify a pending permit application to construct and operate a new waste disposal cell ("Cell 5") at the landfill, as well as to handle particular wastes in certain ways, continue to refuse certain wastes at the landfill, continue to monitor groundwater, purchase certain property from certain plaintiffs, monitor air quality, pay Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") costs, and pay attorneys' fees. Appellees also agreed to install water treatment devices if groundwater contamination exceeded a certain level and to provide the plaintiffs with potable water if contamination exceeded EPA standards; these obligations are not contingent on the settling plaintiffs fulfilling the terms of the Burke Agreement. In exchange, the settling plaintiffs released their claims against Appellees and also agreed not to oppose the Cell 5 permit[2] and to

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[2] "Oppose" was defined as submitting written or oral comments in opposition to the permit to the relevant authorities, speaking in opposition to the permit at public hearings, making statements to the press opposing the permit, providing documents to authorities for the purpose of opposing the permit, providing another person with documents or statements in opposition to the permit, or providing another person with documents for use in opposing the permit.

remove from their websites any language or images "which deal with any of the matters raised in the Action with respect to the Ivy landfill." (J.A. at 99.)

David Booth used the funds he received pursuant to the Booth Agreement to relocate to a new home with his wife. Following the settlement, he "never looked back," (J.A. at 186), and thus could not say with certainty whether the Committee continued to hold meetings after the two settlement agreements went into effect. He did believe the meetings continued, albeit with a smaller group. Although Booth never actually read the terms of his settlement agreement, he perceived that its restrictions on his speech were extremely broad. As a result, there have been "times [he] wanted to say something and realized [he] could not." (J.A. at 163.) Currently, Booth "d[oesn't] really care," (J.A. at 188), whether a court invalidates the speech restrictions in the Booth Agreement. He does, however, resent the encumbrance it represents. Indeed, he feels that "anybody should be able to have a free say," and that he has topics he would like to talk about were he not constrained by the agreement. (J.A. at 162.)

Similarly, Daniel Burke resents his own settlement agreement to the extent that it restricts his ability to oppose the Cell 5 permit. Offended by the idea that "the local government tried to gag its own citizens," he "wanted to feel free to speak out on that issue" and considered challenging the Burke Agreement, but ultimately decided not to do so. Otherwise, Burke did not have any particular issues he wanted to discuss.

Burke agreed to the provision restricting him from opposing the Cell 5 permit only because he knew that the Burke Agreement did not bind Gertrude and Michael Weber ("the Webers") or Ed and Pamela Strange ("the Stranges"), whom he described as core members of the Committee, and whom he believed would become aware of any problems and act as his voice if necessary. According to Burke, the Webers and the Stranges continued to have meetings, at least with their attorneys and a hydrologist, after the other plaintiffs in the *Weber* suit settled. Burke indicated that others have also discussed issues related to the landfill: he knows of two meetings held to discuss leachate problems from the part of the landfill known as Cell 2, but was out of town for both meetings and thus was unable to attend. Burke did not know about the fuel-tank cutting at the landfill. He, like Booth, learned of Wayne Stephens's death through the newspaper.

Ed Strange, however, learned of the fuel-tank-cutting practice before the explosion. Strange noticed black smoke coming from the landfill approximately seven months before Wayne Stephens's death. He inquired into the matter and learned that the black smoke was discharged in connection with the practice of cutting up storage tanks, the practice that ultimately killed Wayne Stephens. Although Strange did not sign either settlement agreement and therefore had no restrictions on his speech, he did not contact anyone regarding what he had learned. According to Strange, the Committee meetings abruptly ended following the settlements, and because he no longer had his "group of associates to discuss landfill issues with, [he] took the matter no further." (J.A. at 275.)

Strange believes that if the Committee had continued its meetings, he would have initiated a vigorous discussion that would have caused the group to pursue the issue "in whatever fashion necessary to either end the practice or obtain assurances (now known not to exist) that the practice was safe." (J.A. at 275.)

Ms. Stephens, too, believes that the explosion would not have occurred had a citizens group more zealously monitored and opposed the landfill activities. Accordingly, on October 1, 2004, Stephens filed a complaint in the U.S. District Court for the Western District of Virginia asserting three causes of action: (1) a violation of the First Amendment proximately causing death (Count I); (2) a violation of Due Process (Count II), and, (3) violations of Ms. Stephens's and her husband's First Amendment rights to receive information concerning safety and environmental hazards posed by the landfill (Count III). Stephens's complaint sought $15 million in damages for the wrongful death of Wayne Stephens and $1 million in damages for the deprivation of the Stephenses' First Amendment rights to receive information concerning the landfill, as well as declaratory and injunctive relief voiding the Booth Agreement and the Burke Agreement.

The district court initially dismissed Stephens's complaint but subsequently granted, in part, Ms. Stephens's motion to reconsider that decision and reinstated the First Amendment claims (Counts I & III). The crux of these claims was Ms. Stephens's contention that the Booth Agreement and the Burke Agreement unconstitutionally conditioned government benefits on the relinquishment of the settling

plaintiffs' First Amendment rights to speak freely about the landfill. This condition, she argued, prevented the dissemination of health and safety information that their neighbors had a reciprocal First Amendment right to receive. Ms. Stephens split the claimed First Amendment violation into two Counts (Counts I & III) because she further alleged that had the settlement agreements not stifled discussion of landfill safety information, someone would have uncovered the OSHA violations occurring at the landfill, thus preventing Wayne Stephens's death. The district court initially doubted Ms. Stephens's standing to assert these "truly novel" claims. (J.A. at 24.) Upon reconsidering its dismissal of Counts I and III at the pleading stage, however, the district court concluded that because Ms. Stephens's complaint alleged the existence of one or more willing speakers and also alleged that she and her husband were potential recipients of speech from the parties to the settlement agreements because they lived in Albemarle County near the landfill, Ms. Stephens, both in her own right and on behalf of her deceased husband, had standing to pursue her First Amendment claims.

Ultimately, the district court granted summary judgment in favor of Appellees. Without revisiting the issue of standing, the court rejected Ms. Stephens's claims on the merits, reasoning that because neither the Booth Agreement nor the Burke Agreement conditioned a government benefit on the surrender of First Amendment rights, Ms. Stephens could not prevail.

Ms. Stephens timely appealed, and we have jurisdiction pursuant to 28 U.S.C.A. § 1291 (West 2006).[3]

II.

As a court of limited jurisdiction, we have "a special obligation to satisfy [our]self not only of [our] own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks omitted). "When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Id.* (internal quotation marks and alteration omitted); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." (internal quotation marks and alteration omitted)). To that end, we must "assure ourselves of [Stephens's] standing under Article III," for the requirement of standing enforces "the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Daimler Chrysler Corp. v. Cuno*, 547

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[3] Ms. Stephens does not appeal the district court's dismissal of the Due Process claim (Count II) under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. (J.A. at 15.) Accordingly, this claim is not before us.

U.S. 332, 340, 341-42 (2006) (internal quotation marks omitted).[4]

It is well-established that, to satisfy Article III's standing requirements, a plaintiff must show that:

> (1) [she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

The Supreme Court in *Lujan* explained that a plaintiff establishes her standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace

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[4] To assist us in this endeavor, we requested supplemental briefs from the parties addressing Ms. Stephens's standing to pursue her claims on behalf of herself and Wayne Stephens. We appreciate the help that they provided.

those specific facts that are necessary to support the claim." *Id.* (internal quotation marks and alteration omitted). "In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must 'set forth' by affidavit or other evidence 'specific facts' . . . which for purposes of the summary judgment motion will be taken to be true." *Id.* (quoting Fed. R. Civ. P. 56(e)).

Ms. Stephens claims that she has set forth a sufficient factual basis for her standing to withstand summary judgment on that ground. According to Ms. Stephens, both she and her husband have suffered "injuries in fact"—violations of their First Amendment right to receive information—that were caused by the speech restrictions Appellees obtained through the settlement agreements and are redressable by a favorable decision in this case. Appellees counter that neither Ms. Stephens nor her husband was a potential recipient of speech covered by the Booth and Burke Agreements. Appellees therefore contend that because the Stephenses would not have received information from the settling plaintiffs about health and safety concerns posed by the landfill, they were not injured by the speech restrictions in the Booth and Burke Agreements. We agree that Stephens's allegations of injury are simply too speculative to support standing.

To be sure, "[i]t is now well established that the Constitution protects the right to receive information and ideas" from a willing speaker. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (explaining that where a willing speaker exists, "the protection afforded [by the First

Amendment] is to the communication, to its source and to its recipients both").

But to have standing to assert a right to receive speech, a plaintiff must show that there exists a speaker willing to convey the information to her. *See FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 838-39 (3d Cir. 1996) (holding that plaintiffs with an interest in a lawsuit had standing to challenge gag order constraining the speech of parties to a widely publicized adoption case because one party to the case had spoken publicly before the gag order, supporting the inference that it would be willing to do so again); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988) (holding that news agencies had standing to challenge gag order constraining speech of trial participants because extensive pretrial publicity showed that the trial participants were willing speakers and that the news agencies were in fact potential receivers of the restrained speech); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 787 n.12 (1st Cir. 1988) (holding that third-party public interest group had standing to challenge protective order in court case because the plaintiffs clearly indicated that they would disseminate the information if permitted to do so, meaning that modification of the order would, as a practical matter, guarantee the group access to documents).

Here, Stephens provided deposition testimony from Booth and Burke indicating their willingness to speak about matters covered by their respective settlement agreements. Booth stated that there were "times [he] wanted to say something and realized [he] could not,"

(J.A. at 163), because of the Booth Agreement. Similarly, Burke expressed resentment toward the inclusion of a speech restraint in the Burke Agreement and a desire to see the restriction lifted. Thus, Ms. Stephens has presented evidence that at least one of the signatories to each settlement agreement would be a willing speaker in the absence of the agreements.

Ms. Stephens has not, however, offered any indication that these willing speakers would have discussed the landfill with her or her husband in the past or that they would presently discuss the landfill with her if they were not constrained by the settlement agreements. Neither Booth nor Burke claimed to have spoken to either of the Stephenses regarding the landfill in the past or to have had any desire to do so. And, looking forward, neither Booth nor Burke have indicated that there is any particular landfill-related issue that either of them would like to discuss. Burke stated that he currently only takes issue with, and wants to speak about, the speech restriction itself; Booth has "never looked back," (J.A. at 181), and "d[oesn't] really care," (J.A. at 188), if the speech restriction is lifted, though he does resent the encumbrance it represents.

Moreover, Ms. Stephens has not sought to discuss the landfill with either Booth or Burke. Burke did not know Stephens, and although Stephens did know Booth, who had been a relatively close neighbor of hers before he relocated, she saw him only on a few occasions after he moved and has never approached him with any questions related to Wayne Stephens's death. Thus, there exists no direct connection between Booth and/or Burke and Stephens such that, absent

the settlement agreements, Stephens would expect to receive the information that Booth and Burke possessed. *Cf. Lamont v. Postmaster Gen.*, 381 U.S. 303, 304-05 (1965) (successful challenge to a statute restricting the right to receive certain publications (deemed communist propaganda) through the mail brought by two individuals whose publications had been detained by the postal service).

Nevertheless, Ms. Stephens argues that she "stands among the core class of foreseeable recipients of the banned safety speech," (Supp. Br. of Appellant at 1), urging us to presume that, because she lives near Booth, Burke, and the landfill, she is a potential recipient of Booth's and Burke's landfill-related speech. This contention, however, is belied by the absence of any indication that Stephens ever once was a recipient of such information from Booth, Burke, or any other Committee member during the years when she claims those individuals were outspoken, as well as by her failure to seek out information from signatories of the Booth and/or Burke Agreements. Although Ms. Stephens alleges that her neighbors were vocal in discussing problems at the landfill prior to the settlements, she does not claim that either she or her husband, who were not members of the Committee, ever heard or read anything from this vociferous group. Similarly, although Ms. Stephens offered evidence that the Committee maintained a website impacted by the settlement agreements, she does not assert that either she or her husband ever visited (or attempted to visit) that website. Instead, she leaves us to speculate that, although she did not receive information from Committee members in the past by virtue of her status as a neighbor and has not

actively sought information from them, something might have changed such that she would now hear from Booth and Burke if they could speak freely. In so doing, she forgets that, to satisfy Article III's standing requirements, a plaintiff must suffer an injury that is "actual and imminent" not "conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

In sum, Ms. Stephens merely speculates that she and/or her husband would have been and that she continues to be a potential recipient of speech from members of the Committee, specifically, Booth and Burke, had those individuals not been subject to restrictions imposed by the Booth and Burke Agreements, respectively. Because Stephens has not provided any factual support for this conjecture, she cannot demonstrate that the speech restrictions in the settlement agreements caused her, or her husband, any injury. Accordingly, both individually and as Wayne Stephens's personal representative, she lacks standing to pursue her First Amendment claims.

III.

For the foregoing reasons, we vacate the judgment of the district court and remand with instructions to dismiss Ms. Stephens's case for lack of jurisdiction.

VACATED AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

Civil No. 3:04cv00081

[Filed April 18, 2007]

PATRICIA STEPHENS, *on behalf of herself, and as Executrix for the Estate of WAYNE STEPHENS, husband, decedent,* *Plaintiff,*	)
v.	)
COUNTY OF ALBEMARLE, CITY OF CHARLOTTESVILLE, AND RIVANNA SOLID WASTE AUTHORITY, *Defendants*	)

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

This matter is before the Court on Defendants' Motion for Summary Judgment, filed on September 15, 2006 (docket entry no. 53) and on Plaintiff's Motion for Summary Judgment, filed on September 25, 2006 (docket entry no. 55). For the following reasons,

Defendants' motion will be GRANTED and Plaintiff's motion will be DENIED, both in an order to follow.

I. Background

Plaintiff Patricia Stephens sued the County of Albemarle, the City of Charlottesville, and the Rivanna Solid Waste Authority ("RSWA") (collectively, "Defendants") under 42 U.S.C. § 1983 on behalf of herself and her decedent husband, seeking damages for alleged violations of both her and her husband's constitutional rights secured by the First and Fourteenth Amendments of the United States Constitution. Her claims originate from a civil case filed by various neighbors (but not Plaintiff) of the Ivy Landfill, which is operated by Defendants, against Defendants. *See Weber v. Rivanna Solid Waste Authority*, 3:98cv00109 (W.D. Va. 1998). Two settlement agreements resulted from the *Weber* action: the so-called "Booth Agreement" and the so-called "Burke Agreement."

In the Booth Agreement, Defendants agreed to purchase the Booths' property; in exchange, the Booths agreed to the following provisions: (1) remove information from the Internet and from billboards that dealt with any of the matters raised in the *Weber* action or with any matters with respect to the Ivy Landfill; (2) cease opposition to the Ivy Landfill; (3) refrain from directly or indirectly opposing the landfill; (4) make no further private or public adverse comments about the landfill; and (5) "not engage or solicit from others any opposition to or legal action opposed to" the landfill.

In the Burke Agreement,[1] Defendants agreed to (1) modify a pending permit application; (2) establish a program to prevent hazardous waste from being disposed in two cells at the landfill; (3) continue to refuse to accept certain waste; (4) not dispose of certain waste in certain cells; (5) continue to monitor groundwater; (6) purchase certain property of certain plaintiffs; (7) install water treatment devices should groundwater contamination exceed a certain level; (8) provide plaintiffs with potable water should contamination exceed EPA standards; (9) monitor air quality levels; (10) pay CERCLA costs; and (11) pay attorneys' fees. In exchange for all of these agreements—except (7) and (8)[2]—the Burke plaintiffs agreed to the following provisions: (1) not oppose the issuance of a permit to RSWA for a certain type of waste disposal cell, (2) remove a website opposing the

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[1] Plaintiff argues that the Court may not consider the Burke Agreement because its terms dictate that it may not be used in subsequent litigation. The Court has already taken judicial notice of the Burke Agreement; regardless, Plaintiff cannot base her legal theory on the contents of the Burke Agreement and simultaneously ask the Court to interpret the agreement based not on the explicit terms of that agreement but instead on Burke's interpretation of it.

[2] According to the terms of the Burke Agreement, the Defendants' obligations regarding the water treatment devices and providing potable water are not contingent upon the Burke plaintiffs fulfilling their obligations.

[3] "Oppose" is defined as activities such as presenting oral comments at public hearings in opposition to the permit, making statements to the press in opposition to the permit, and providing

landfill; and (3) remove information from any other website or billboard dealing with matters raised in the *Weber* litigation. Nothing in the Burke Agreement indicates that the Burke plaintiffs could not make private or public adverse comments of a general nature about the landfill, as is the case for the Booth plaintiffs.

Plaintiff claims that these settlement provisions eventually led to her husband's death. Plaintiff's husband was employed by RSWA and died on April 10, 2003, as a result of an explosion that occurred while he was cutting old oil storage tanks ("the practice"). Plaintiff claims that if not for the provisions requiring the *Weber* plaintiffs to cease their opposition to Defendants' activities at the landfill, the practice would have been exposed as a violation of regulations promulgated by the Occupational Safety & Health Administration ("OSHA"), resulting in the practice being terminated or in her husband refusing to engage in the practice prior to his death.

Two of Plaintiff's original claims survive: (1) Defendants violated Plaintiff's and decedent's First Amendment right to receive speech (Count III) and (2) this violation proximately caused decedent's death (Count I). Both parties agree that resolution of the question of whether either *Weber* agreement violates the unconstitutional conditions doctrine controls the outcome in this case: if the unconstitutional conditions

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documents to relevant authorities for the express purpose of opposing the permit.

doctrine has been violated, the parties can move to the issue of causation; if not, Plaintiffs claims must fail.

II. Standard of Review

Federal Rule of Civil Procedure 56(c) provides that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment under Rule 56 is appropriate only when the court, viewing the record as a whole and drawing reasonable inferences in the light most favorable to the nonmoving party determines that the Rule 56(c) standard has been met. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994); *Terry's Floor Fashions, Inc. v. Burlington Indus., Inc*, 763 F.2d 604, 610 (4th Cir. 1985).

If the nonmoving party bears the burden of proof, "the burden on the moving party may be discharged by 'showing' ... an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. If the moving party shows such an absence of evidence, the burden shifts to the nonmoving party to set forth specific facts illustrating genuine issues for trial. *See* Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

A court must grant a motion for summary judgment if, after adequate time for discovery, the nonmoving party fails to make a showing "sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but ... [must] by affidavits or as otherwise provided in ... [Rule 56] set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Indeed, the nonmoving party cannot defeat a properly supported motion for summary judgment with mere conjecture and speculation. *Glover v. Oppleman*, 178 F. Supp. 2d 622, 631 (W.D. Va. 2001) ("Mere speculation by the non-movant cannot create a genuine issue of material fact."). If the proffered evidence "is merely colorable, or is not significantly probative, summary judgment may be granted. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Anderson*, 477 U.S. at 242). The trial judge has an "affirmative obligation" to "prevent 'factually unsupported claims and defenses' from proceeding to trial." *Id.* (quoting *Celotex*, 477 U.S. at 317).

III. Discussion

As can be distilled from two prior opinions in this case (*see* Mem. Op., Aug. 26, 2005 ("August opinion"); Mem. Op., Dec. 22, 2005 ("December opinion")), Plaintiff has a right to receive information so long as there is a willing speaker. Here, Plaintiff alleges that there are willing speakers—the *Weber* plaintiffs—but that those speakers have been silenced via the Booth and Burke Agreements, agreements that she argues constitute an unconstitutional condition on a government benefit.

The unconstitutional conditions doctrine states that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1306–07 (2006) (omission in original); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."). The doctrine necessarily requires that there be a government benefit and that the benefit be conditioned on a party giving up certain constitutional rights.

With respect to the Booth Agreement, Defendants have established that Plaintiff's earlier contentions that the Booths were receiving safe drinking water from the government are unfounded (i.e., the Booths were receiving their drinking water from a private well) and, more importantly, that the Booth Agreement itself—by its own terms—does not reveal a government benefit that would trigger the unconstitutional conditions doctrine. The only benefit in the Booth Agreement is the payment of money to the Booths in exchange for their property. There is no term or condition related to safe drinking water in the Booth Agreement. Having established this point, the burden then shifts to Plaintiff, the nonmoving party; if Plaintiff fails to make a showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," *Celotex Corp. v. Catrett*, 477

U.S. 317, 322 (1986), the Court must grant summary judgment for the movant.

In her memorandum in response, Plaintiff characterizes the benefit as "the Defendants gave the Booths money to allow them to move from their contaminated home" and as "the money to allow [the Booths] to move away from their dream home" and "being able to live in an uncontaminated home."[4] Because, she argues, "Defendants have failed to prove that there was no unconstitutional condition" in the Booth Agreement, summary judgment for Defendants would be improper. Plaintiff misses the point: Defendants have discharged their duty under the summary judgment standard by showing that there was no benefit in the Booth Agreement sufficient to trigger the unconstitutional conditions doctrine. The burden has shifted to Plaintiff to not assert that Defendants have failed to prove a point, but to instead put forth sufficient evidence to show that Defendants cannot succeed *as a matter of law*. In other words, Plaintiff must show how the "benefits" she cites are those that would be covered by the unconstitutional conditions doctrine. In her memorandum in response to Defendant's motion for summary judgment and in her memorandum in support of her own motion for

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[4] In her memorandum supporting her own motion for summary judgment, Plaintiff characterizes the benefit as "the means by which to relocate from their beloved home which the government had contaminated and made unsafe for habitation" (citing to the Weber complaint) and as "provid[ing] them the means [money] to move from the property they themselves contaminated." There is no evidence before the Court that the Booth property was contaminated.

summary judgment, Plaintiff has not cited a single case or legal argument that would support her theory that the "benefits" she identifies would be sufficient to trigger the unconstitutional conditions doctrine. Therefore, summary judgment for Defendants with respect to the Booth Agreement will be granted.

With respect to the Burke Agreement, there is no government benefit contingent on those plaintiffs' silence.[5] Although the Burke Agreement imposed on Defendants obligations relating to groundwater contamination and potable drinking water, the terms of that agreement make clear that neither of those benefits are contingent on the Burke plaintiffs giving up any First Amendment rights. Plaintiff argues that "the benefit was the guarantee itself—that Defendants would take steps to prevent the [Burke] plaintiffs' water from being contaminated." Again, however, as the agreement terms make clear, that "benefit" was not contingent on the Burke plaintiffs giving up First Amendment rights. Therefore, the unconstitutional conditions doctrine is not invoked and, as with the Booth Agreement, summary judgment for Defendants is proper.

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[5] Indeed, by the terms of the Burke Agreement, the Burke plaintiffs are only prohibited from opposing a permit and must remove information from websites and billboards that oppose the landfill. Nothing in the Burke Agreement prohibits those plaintiffs from otherwise speaking out about the landfill.

IV. Conclusion

For the forgoing reasons, Defendants' motion for summary judgment will be GRANTED and Plaintiff's motion for summary judgment will be DENIED, both in an order to follow.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: _____
United States District Judge

_____
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

Civil Action No. 3:04CV00081

[Filed December 22, 2005]

PATRICIA STEPHENS,	)
Plaintiff,	)
	)
v.	)
	)
COUNTY OF ALBEMARLE,	)
CITY OF CHARLOTTESVILLE,	)
RIVANNA SOLID WASTE AUTHORITY,	)
Defendants.	)
	)

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

Before the Court is the Plaintiff's Motion to Alter or Amend Judgment, filed on September 12, 2005 pursuant to Fed. R. Civ. P. 59(e). In this motion, the Plaintiff moves the Court to reconsider its August 26, 2005 order dismissing her claims. That order addressed three motions filed by the Defendants in response to claims filed by the Plaintiff pursuant to 42

U.S.C. § 1983 for alleged violations of the First Amendment of the United States Constitution and the Due Process Clause of the Fourteenth Amendment. The Defendants' motions are: (1) a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1); (2) a motion to dismiss for lack of standing under Fed. R. Civ. P. 12(b)(1); and (3) a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In its August 26, 2005 opinion, the Court denied the motion to dismiss for lack of subject matter jurisdiction, but granted dismissal of the First Amendment claims for lack of standing and granted dismissal of the Due Process claim for failure to state a claim. The Plaintiff has filed this Motion to Alter or Amend Judgment only with respect to the Court's decision to dismiss her First Amendment claims on grounds of standing.

Having reconsidered this matter, the Court agrees with the Plaintiff that she has standing to assert a claim under the First Amendment and that, consequently, her complaint has stated a claim on which relief may be granted.

I. Facts

On October 15, 2004, Patricia Stephens (the "Plaintiff) filed a complaint against the County of Albemarle, the City of Charlottesville, and the Rivanna Solid Waste Authority (the "RSWA") (collectively, the "Defendants") under 42 U.S.C. § 1983 on behalf of her decedent husband and herself, seeking damages for alleged violations of both her and her husband's constitutional rights secured by the First and Fourteenth Amendments of the United States

Constitution. The origins of her claim go back to 1998, when various neighbors of the Ivy Landfill, which is operated by the Defendants, all governmental entities, sued the Defendants for environmental violations at the landfill. *Weber v. Rivanna Solid Waste Authority,* 3:98CV00109 (W.D. Va. 1998). A number of the citizen-plaintiffs ultimately settled with the Defendants and the court, under presiding United States District Judge James H. Michael, approved these settlements and dismissed the case.[1] In return for the Defendants' agreement to certain waste disposal, monitoring, and remediation measures, the settling plaintiffs agreed to refrain from engaging in certain forms of opposition to the Defendants with respect to the landfill. The Plaintiff alleges that in settling these claims, the Defendants coerced or purchased the silence of the citizen-plaintiffs on safety matters pertaining to the landfill. She alleges that one such settlement required some of the *Weber* plaintiffs to

> agree to remove the Ivy Steering Committee website and any language or images from any personal websites and billboards, from the public domain which deal with any of the matters raised in the Action or with respect to the Ivy landfill. Further the [plaintiffs] will cease opposition to the Ivy landfill and any further permits for which it may apply, will

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[1] The claims of four other citizen-plaintiffs were voluntarily dismissed, subject to Tolling Agreement(s) giving these plaintiffs the right to reinstitute proceedings withing a specified period of time. Such time has passed and no further actions have been instituted.

> refrain from directly or indirectly opposing the landfill or permitting, will make no private or public adverse comments about the landfill, and will not engage or solicit from others any opposition to or legal action opposed to said landfill or its permitting process.

The record in *Weber* includes two settlements. One settlement was filed under seal and is not currently available to the public. *See Weber,* 3:98CV00109 (document # 56). Another settlement, however, was not filed under seal and is contained in the record at document number 64. This settlement included an agreement on the part of the plaintiffs to not oppose the issuance of a permit to the RSWA for a certain type of waste disposal cell. This settlement defines "opposing" to include activities such as presenting oral comments at any public hearing in opposition to the permit, making statements to the press in opposition to the permit, and providing documents to the relevant authorities for the express purpose of opposing the permit. This settlement also required the plaintiffs to remove a website that they had created in opposition to the landfill as well as any language or images on any other personal websites or billboards dealing with matters raised in the litigation. However, it did not prohibit the plaintiffs from making "private or public adverse comments about the landfill" in general.

The Plaintiff alleges that the provisions to which the settling plaintiffs agreed led to her husband's death in an explosion at the landfill, where he worked as an employee of the RSWA. On April 10, 2003, the decedent died as a result of an explosion that occurred when he was cutting up old oil storage tanks at the

landfill, a practice which the Plaintiff alleges is a "serious" OSHA violation. The Plaintiff claims that, if not for these provisions requiring the settling plaintiffs to cease their opposition to the Defendants, this practice would have been exposed as an OSHA violation and these practices would have been terminated or the decedent would have refused to engage in them before the date of the accident that resulted in his death.

Although the Plaintiff's complaint includes a count for violation of her and her husband's rights to Due Process under the Fourteenth Amendment, she moves the Court to Amend or Alter Judgment only with respect to her First Amendment claims. In Count I ("Violation of First Amendment proximately causing death"), the Plaintiff claims that the Defendants violated the decedent's First Amendment right to receive speech and proximately caused his death when they "purchased silence or otherwise gagged those knowledgeable about safety problems" at the landfill. Count III involves purely constitutional claims, asserting that the Defendants violated the First Amendment rights of the Plaintiff and her decedent husband to receive speech concerning the landfill from the settling plaintiffs. Thus, the Plaintiff brings Counts I in her representative capacity and Count III in her individual and representative capacity.

II. Standard of Review

A. Motion to Dismiss

In deciding any motion to dismiss under Rule 12(b), a court must construe the plaintiff's pleadings

liberally, taking all facts alleged in the complaint as true and resolving all doubts and drawing all reasonable inference in the plaintiff's favor. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Edwards v. City of Goldsboro,* 178 F.3d 231, 243-44 (4th Cir. 1999); Charles Alan Wright and Arthur Miller, Federal Practice and Procedure § 1363 at 463 (West Supp. 2004). However, a court is not required to accept any legal conclusions offered by the plaintiff in the complaint. *United Mine Workers of America, Inc. v. Wellmore Coal Corp.,* 609 F.2d 1083, 1085 (4th Cir. 1979). On a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, the burden of proving subject matter jurisdiction lies with the plaintiff. *Thomson v. Gaskill,* 315 U.S. 442, 446 (1942); *Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.,* 166 F.3d 642, 647 (4th Cir. 1999). A motion to dismiss for failure to state a claim under Rule 12(b)(6) must not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hospital Bldg. Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976) (quoting *Conley v. Gibson,* 355 US. 41, 45-46 (1957)).

B. Motion to Alter or Amend Judgment

A Rule 59(e) motion "is discretionary" and need not be granted unless the district court finds that there is an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *National Trust v. Department of State,* 834 F. Supp. 453, 455 (D.D.C. 1993), aff'd in part and rev'd in part on other grounds sub nom. *Sheridan Kalorama Historical Ass'n*

v. Christopher, 49 F.3d 750 (D.C. Cir. 1995) (quoting *Virgin Atlantic Airways, Ltd. v. National Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir.), cert. denied 506 U.S. 820 (1992)). Rule 59(e) motions may not be used by a party to raise arguments which could have been raised prior to judgment or to enable a party to continue presenting his case after a court has ruled against him. *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998) (citing *Russell v. Delco Remy Div. of Gen. Motors Corp.,* 51 F.3d 746, 749 (7th Cir. 1995) and *In re: Reese,* 91 F.3d 37, 39 (7th Cir. 1996). The rule does, however, permit a district court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Id.* (quoting *Russell,* 51 F.3d at 749).

III. Discussion

A. Motion to Alter or Amend Judgment

The Plaintiff maintains that the Court should alter or amend its judgment for two reasons. First, the Plaintiff points to the fact that the *Weber* case contained a second, sealed settlement agreement which was not judicially noticed in the Court's opinion even though the non-sealed one was. Second, the Plaintiff contends that the opinion incorrectly applied Rule 12(b) and that merely alleging the existence of willing speakers is enough to allow her claim to survive a motion to dismiss.

The Court acknowledges that the Plaintiff has correctly pointed out that *Weber* contained another settlement agreement which was not judicially noticed

in the Court's memorandum opinion. In her objections to the Magistrate's Report and Recommendation, the Plaintiff objected to the Magistrate's judicial notice of the non-sealed settlement at document number 64 and stated that it was her "understanding" that the Defendants had conducted another settlement with other litigants. The Court, however, found that the Magistrate's taking of judicial notice of the non-sealed settlement was appropriate and noted that the Plaintiff should indicate which other settlements she would have the Court notice rather than resting on her understanding of them. The opinion, accordingly, took judicial notice of the non-sealed settlement and conducted its analysis according to the terms therein rather than according to the settlement as alleged by the Plaintiff. In retrospect, the Court finds that this approach was erroneous and unduly prejudicial to the Plaintiff in light of the fact that *Weber* contained a second, sealed settlement, the presence of which the Court overlooked while writing its opinion.

A considerable portion of the August 26, 2005 opinion related to the constitutionality of the terms contained in the non-sealed settlement. However, because there exists another settlement which remains under seal, the Court does not find it appropriate to judicially notice the terms contained therein while the settlement remains unavailable to the public, including the Plaintiff. Thus, the Court finds that the better approach is to conduct its analysis according to the terms alleged by the Plaintiff rather than according to terms publically available in the non-sealed settlement. Such an approach also better comports with the Court's obligation to construe the Plaintiff's complaint liberally and take all of its

allegations as true during a motion to dismiss under Rule 12(b). Accordingly, the Court will reconsider its opinion of August 26, 2005.

B. Motion to Dismiss First Amendment Claims for Lack of Standing

The doctrine of standing contains three essential requirements: (1) the plaintiff must have suffered an invasion of a legally protected interest; (2) there must be a causal link between the injury and the conduct complained of such that the injury is fairly traceable to the actions of the defendant; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). As the party invoking federal jurisdiction, the Plaintiff bears the burden of establishing these elements. *Id.* at 561. However, because this case is at the pleading stage, general factual allegations of injury resulting from the Defendants' conduct will suffice because the general allegations are presumed to embrace those specific facts necessary to support the claim. *Id.*

The Defendants move the Court to dismiss the Plaintiff's First Amendment claims for lack of standing. For purposes relating to the Plaintiff's Motion to Alter or Amend Judgment, the Court will only address the Defendant's argument that the Plaintiff fails to articulate a violation of her or her husband's First Amendment rights to free speech. The Defendants argue that the disputed settlement provisions only implicate the First Amendment rights of the settling plaintiffs and not those of the instant Plaintiff or her decedent, who were not parties to that

Agreement or in any way involved in the litigation against the Defendants. They go on to assert that neither the Plaintiff nor her decedent had a right to receive information about the landfill from the settling plaintiffs because they were not willing speakers, as evidenced by their agreement to cease opposition to the landfill. This motion, therefore, asserts that the Plaintiff has no standing to raise these First Amendment claims because she does not articulate any legally protected right to receive speech concerning the landfill from the Settling Plaintiffs.

The Plaintiff contends that her complaint does allege an invasion of First Amendment rights to free speech belonging to her and her husband, thereby satisfying the injury element of the *Lujan* test for standing. The Plaintiff's claim that the Defendants violated her and her husband's First Amendment rights is grounded on two arguments. First, she argues that as members of the public who stood to be affected by the landfill's operations, she and her husband had a First Amendment right to receive speech concerning the landfill's operations from the settling plaintiffs, who had willingly spoken out against the landfill prior to the settlement. Second, she argues that the Defendants violated this right to receive speech by unconstitutionally inducing the settling plaintiffs to give up their right to oppose the landfill in exchange for safe drinking water.

The Plaintiff's claim rests upon two doctrines which are well established in constitutional jurisprudence. Her claim, however, is novel to the extent that her request for relief seeks to combine both of these theories. The first doctrine underpinning the Plaintiff's

claim is the unconstitutional conditions doctrine. This doctrine serves to prevent the government from conditioning the receipt of government benefits, even when discretionary, on the relinquishment of one's constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Courts have applied this doctrine with special vigor in the First Amendment context in order to protect one's right to speak freely from undue governmental interference. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969); and *Pickering v. Board of Education*, 391 U.S. 563 (1968). In determining whether the condition is unconstitutional, courts will balance the right surrendered against the government's interest in efficiently providing benefits and services. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 676 (1996).

The second constitutional foundation on which the Plaintiff's claim rests is the First Amendment right to receive speech. The right to receive speech has long been recognized as a necessary component of protecting freedom of speech, *see Stanley v. Georgia*, 394 U.S. 557, 564 (1969), yet it is also a right that is contingent on the willingness of others to speak. *See Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 756 (1976). Where a willing speaker exists, "the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both." *Id.* Conversely, a plaintiff does not have standing to assert a right to receive speech where he cannot show that there exists a speaker willing to convey information to him. *See, e.g., FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 838-839 (3rd Cir. 1996).

While each prong of the Plaintiff's claim is grounded in constitutional precedent, what is truly novel is her attempt to apply both in tandem and argue that a settlement between the government and citizen litigants involving an agreement to refrain from certain forms of speech has violated the right of third-party non-litigants to receive speech. Whether such an assertion may state a claim entitling the Plaintiff to relief, consequently, turns on (1) whether the Plaintiff has alleged an unconstitutional condition on a governmental benefit and (2) whether such an unconstitutional silencing of a speaker implicates the Plaintiff's right to receive speech. The Court will address these issues *in seriatim*.

The Plaintiff asserts that the Defendants unconstitutionally silenced multiple citizen plaintiffs in *Weber* by entering into settlement agreements with them that conditioned the receipt of safe drinking water and other benefits on the relinquishment of their right to engage in speech opposed to the Defendants. Whether such a provision could amount to an unconstitutional condition depends, initially, on whether this doctrine applies in the context of court-approved settlement agreements.

The Court finds that viewing the unconstitutional conditions doctrine in relation to a waiver of one's constitutional rights is a helpful starting point for determining whether this doctrine applies to offers of settlement. After all, the unconstitutional conditions doctrine essentially concerns when the government can use its power to distribute largess to induce citizens to effectively waive their constitutional rights in exchange for a receipt of benefits. With respect to

settlements, the Court recognizes that the unconstitutional conditions doctrine could never apply as an absolute rule because all settlements between the government and citizen litigants involve a waiver of constitutional rights, such as the right to pursue further litigation in court. Yet it would vitiate the unconstitutional conditions doctrine to conclude that it cannot apply to an offer of settlement simply because the condition constituted yet another right waived. If that were all it took, it is hard to see what would remain of the doctrine. The mere fact that one agrees to the challenged condition, even in a settlement, cannot by itself render the bargain constitutional because the unconstitutional conditions doctrine focuses on the propriety of the condition, not the fact that the claimant agreed to it. *Parks v. Watson,* 716 F.2d 646, 651 (9th Cir. 1983). Many cases, after all, involve a challenge to a condition to which the claimant has already agreed. *See, e.g., W & S. Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648 (1981); *Mansoor v. County of Albemarle,* 189 F. Supp. 2d 426 (W.D. Va. 2002); *Davies* v. *Grossmont Union High School District,* 930 F.2d 1390 (9th Cir. 1991).

Certainly, the litigation context is relevant, especially where the court approves the settlement and there is no unreasonable disparity of bargaining power. This judicial oversight will likely serve to mitigate the potential for abusive conditioning of governmental benefits in many cases. However, this should hardly serve as a basis for precluding the doctrine from applying in those instances where impermissible terms do become ratified in a settlement agreement. Giving effect to otherwise unconstitutional terms simply because of their ratification by

settlement would effectively create a safe haven for impermissible restrictions, allowing the government to circumvent the unconstitutional conditions doctrine by going through the formality of a settlement agreement.[2] This would increase the risk that a settlement is less of a reasonable offer of compromise and more of a coercive attempt to extract waivers of constitutional rights from parties with diminished bargaining power.

Having found that a plaintiff may state a claim by alleging an unconstitutional condition in a settlement agreement, the Court must next address the issue of whether a settlement that unconstitutionally restricts a settling party's freedom of speech might violate a third party nonlitigant's right to receive speech. This question clearly implicates important issues

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[2] The proposition that the unconstitutional conditions doctrine applies to the settlement context is further supported by the fact that courts have often scrutinized waivers found in contractual agreements. *See, e.g., Mansoor,* 189 F. Supp. 2d at 433-437 (finding unconstitutional an employment agreement restricting an employee's right to criticize superiors at police department); *Lake James Community Volunteer Fire Department, Inc. v. Burke County,* 149 F.3d 277 (4th Cir. 1998) (balancing the constitutional right surrendered in a fire services contract with county against the county's interest in efficient provision of services); *Davies,* 930 F.2d at 1399 (finding unconstitutional a term in a settlement agreement between a citizen and a school district whereby the citizen agreed to not run for public office in the district). Settlement agreements are contractual in nature and it is, therefore, not a stretch to conclude that the unconstitutional conditions doctrine would apply in similar fashion in this context as well.

surrounding the non-litigant's standing and is further complicated where the settling party has not raised objections to the settlement terms. It is important to recognize, however, that the right to receive speech is itself a recognition that third parties can have standing to challenge speech restrictions affecting others. In *Virginia State Bd. of Pharmacy,* for example, the Court allowed a prescription drug purchaser and two nonprofit organizations to challenge a Virginia statute which restricted the right of pharmacists to advertise the price of their drugs, recognizing that First Amendment protection applies to the recipient of the communication as well as its source. *Id.* 425 U.S. at 756. This constitutional right "may be asserted" by the recipient. *Id.* at 757. Third party standing, moreover, does not require that the person subject to the restriction object, only that he be *willing* to speak. *Id.* at 756 (holding that First Amendment protections presuppose a willing speaker); *see also, FOCUS,* 75 F.3d at 838-839 (recognizing that third parties may challenge gag orders where "there is reason to believe that the individual subject to the gag order is willing to speak and is being restrained from doing so.").

Of course, the instant case is complicated by the fact that the restrictions in question were agreed to by the settling plaintiffs, unlike the pharmacists in *Virginia State Bd. of Pharmacy* who were subject to speech restrictions by state regulation. Another situation in which courts have addressed the right to receive speech involving speakers who have agreed to remain silent is in the context of court-imposed restrictions on extrajudicial speech during trials. Some courts have found that where a restraining order

preventing parties at trial from speaking to the press are consented to or not challenged by those subject to the restriction, third parties such as the press cannot challenge the orders as unconstitutional prior restraints. For example, in *In re Application of Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988), the Second Circuit heard a news agency's challenge to a court's restraining order which forbade all trial participants from engaging in extrajudicial speech during a trial. The court found that the news agency had standing to challenge the restraining order because it was a potential recipient of speech from parties who would be willing speakers in absence of the order. *Id.* at 608. However, the court went on to find that the news agency could not challenge the restraining order as a prior restraint because the order was requested by the trial participants.[3] *Id.; see also, Radio & Television News Ass'n. v. United States Dist. Court for Cent. Dist. of Ca.*, 781 F.2d 1443 (9th Cir. 1986) (holding that third party petitioner had no standing to challenge gag order imposed on trial counsel when trial counsel themselves did not challenge it). Similarly, the Defendants argue that the Plaintiff does not have standing to assert a right to receive speech from the settling plaintiffs in *Weber* because they voluntarily agreed to the speech limitations and, consequently, are not willing speakers. This argument has a certain amount of appeal, yet the Court finds it to be less persuasive given this case's context as a challenge to a forfeiture of speech as a result of an unconstitutional condition. As discussed above, it is often the case that

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[3] The court did, however, allow the agency to challenge the order on other grounds.

an offer by the government to provide a benefit in return for the relinquishment of speech will result in a citizen agreeing to a condition and waiving particular constitutional rights. An important basis for the constitutional conditions doctrine, however, is that in some instances the condition itself is unconstitutional because of its power to coerce a citizen into unwillingly surrendering a constitutional right in exchange for a governmental benefit,[4] rendering of little import the fact that the citizen formally "agreed" to the exchange. Thus, the Court cannot presume as a matter of law that a party is not a willing speaker simply by having agreed to give up certain constitutional rights, especially where it is alleged that the term is unconstitutional on the grounds that it coerced a forfeiture of constitutional rights.

That being the case, it does not require much of a leap to conclude that a third party may challenge a restraint imposed on a willing speaker in the form of an unconstitutional condition rather than a more typical prior restraint. Although different in form, silencing a willing speaker by means of an unconstitutional condition is no less an infringement

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[4] *See, e.g., O'Hare Truck Serv. v. City of Northlake,* 518 U.S. 712, 721 (U.S. 1996) (finding coercion where city retaliated against independent contractor towing company for opposing mayor's re-election); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1 967) (finding unconstitutional a state regulation conditioning teaching position upon nonmembership in "subversive" organizations). *See also* Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1415, 1428-55 (1989).

of that speaker's First Amendment Rights than silencing him through a prior restraint. The potential recipient's right to receive speech from that speaker, likewise, is no less diminished on account of the silence being achieved through an unconstitutional condition rather than a prior restraint in the form of a state regulation or statute. By way of analogy, the Court doubts whether the outcome in *Virginia State Bd. of Pharmacy* would have been different had the pharmacists been silenced by having to agree to not advertise prescription drug prices as a condition for being able to practice their profession. Thus, the Court finds that a claimant may state a claim on which relief may be granted by alleging that a she was a potential recipient of speech from a willing speaker silenced as the result of an unconstitutional condition in a settlement agreement.

The Court will now examine whether the Plaintiff, with all of her facts accepted as true and with all reasonable inferences drawn in her favor, states a claim under such a theory. The Court finds that she does. The Plaintiffs complaint alleges the existence of one or more willing speakers restrained by the Defendants from speaking about conditions at the landfill. Certainly, the existence of the litigation in *Weber* indicates that there were those who were willing to speak out about dangerous conditions at the landfill. The provisions restricting the *Weber* plaintiffs' ability to oppose the landfill, moreover, indicates that even after the conclusion of the litigation some plaintiffs would be willing to continue voicing their concerns about the landfill.

The Defendants contend that the *Weber* plaintiffs cannot be considered willing speakers since they agreed to the speech provisions in settlement. This brings the Court to the point raised by the Plaintiff in her Motion to Alter or Amend Judgment that pleading the existence of willing speakers is sufficient to survive a motion to dismiss. The Plaintiff contends that a person can still be a willing speaker even though she may not be able to speak because of an agreement not to do so. She further suggests that any conclusion that a former speaker is no longer willing to speak because of an agreement to remain silent presupposes certain factual assumptions about the voluntariness of the agreement, which are premature before any discovery has taken place. After reconsidering the matter, the Court agrees with the Plaintiff. While it could be true that the *Weber* plaintiffs are no longer willing to speak out against the landfill, the mere fact of their agreement to the speech provisions cannot foreclose the possibility of their willingness to speak, especially given the issues of coercive settlement terms raised by the Plaintiff. Whether they are in fact no longer willing speakers depends on factual assumptions relating to the voluntariness of the settlement and on the presence of other factors, not noticeable in the record in *Weber*, indicating that the speech provisions are void as unconstitutional conditions.[5] Such

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[5] Certainly, the Court is free to judicially notice the literal terms of prior settlements in *Weber*, including those provisions wherein the parties represent their desire to voluntarily enter into settlement. However, it is quite another thing for the Court to conclude from that that the plaintiffs actually entered into the agreement voluntarily.

determinations necessarily depend on the ability of the parties to conduct discovery and, consequently, are inappropriate for purposes of a motion to dismiss.

The Plaintiff also alleges that she and her husband were potential recipients of speech from the *Weber* plaintiffs because they resided in Albemarle County in proximity to the landfill. The Court accepts this pleading as true for purposes of this motion to dismiss. *See Scheuer,* 416 U.S. at 236; *Edwards,* 178 F.3d at 243-244. Because the Plaintiff has alleged that willing speakers were restrained by the Defendants from speaking out to members of the public, including the Plaintiff and her husband, concerning conditions at the landfill, the Court concludes that the Plaintiff has standing, both in her personal capacity and in her capacity as the decedent's personal representative,[6] to

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[6] The Court notes that under Virginia law, a decedent's personal representative may only bring a wrongful death claim on behalf of the decedent under Virginia's wrongful death statute, Va. Code Ann. § 8.01-50, but not for other claims, which do not survive. In an action brought pursuant to 42 U.S.C. § 1983, a federal court must adopt a state's survivorship law as the federal law governing the abatement of claims, provided that such law is not inconsistent with the Constitution and the laws of the United States. *Robertson v. Wegmann,* 436 U.S. 584 (1991). More specifically, "whenever a state survival statute would abate the action brought against defendants whose conduct results in death, the federal common law permits survival of the action." *O'Connor v. Several Unknown Correctional Officers,* 523 F. Supp. 1345, 1348 (E.D. Va. 1981) (citing *Carlson v. Green,* 446 U.S. 14 (1980)). That is exactly the situation here. Because the alleged First Amendment violations are the same acts that caused the decedent's death, it would be inconsistent with the policies of

assert First Amendment claims based on their right to receive speech. *See Virginia State Bd. of Pharmacy,* at 425 U.S at 757.

C. Motion to Dismiss for Failure to State a Claim

In the memorandum opinion of August 26, 2005, the Court did not address the question of whether the Plaintiff's complaint stated a claim for violation of her and her husband's First Amendment right to receive speech due to already having dismissed her claim on standing grounds. The Court now addresses this issue because of its decision to alter its original judgment to find that the Plaintiff has standing to assert First Amendment claims.

The arguments raised by the Defendants in support of their motion to dismiss the Plaintiff's First Amendment claims for failure to state a claim parallel the arguments made with regard to standing. With respect to Count I, the Defendants assert that the Plaintiff fails to state a claim because she only asserts the First Amendment rights of the settling plaintiffs in *Weber* and because the causal link between the Defendants actions in settling the claims in *Weber* and the decedent's death is too attenuated and speculative to support causation. With respect to Count III, the

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§ 1983 to allow Virginia's survival law to prevent his personal representative from bringing alleged constitutional claims that the decedent could have brought if he were still alive. Thus, the Plaintiff has standing to bring her decedents husband's claims, both for wrongful death and for the violation of his First Amendment right to receive speech.

count based purely on constitutional violations of the Plaintiff's and decedent's First Amendment rights, the Defendant claims that the Plaintiff has only pled violations of the constitutional rights of the settling plaintiffs in *Weber* and has not alleged any facts that would allow for an award of damages.

As explained *supra* in the Court's standing analysis, the Plaintiff has pled a violation of her and her decedent husband's First Amendment right to receive speech and, therefore, has stated a claim for which relief may be granted. Similarly, the Court has already ruled in its prior opinion that the Plaintiff has adequately pled causation for purposes of standing and finds the same with respect to whether the Plaintiff has stated a claim. Although the chain of causation alleged is certainly indirect, it would be premature to hold that it is too attenuated to state a claim before any discovery has occurred. Finally, the Defendants are mistaken in contending that Count III should be dismissed for failing to allege actual damages resulting from the violation of the First Amendment. While a plaintiff must prove actual injuries beyond an abstract violation of her constitutional rights in order to recover compensatory damages, a plaintiff who cannot do so can nonetheless maintain an action and recover nominal damages. *See Memphis Community Sch. Dist. v. Stachura,* 477 U.S. 299, 308 (1986); *Carey v. Piphus,* 435 U.S. 247, 266-67 (1978); *Burt v. Abel,* 585 F.2d 613, 616 (4th Cir. 1978). Thus, even if the Plaintiff was unable to show that the settlement provisions proximately caused the decedent's death, she could still maintain an action for recovery of nominal damages for any violation of her or her husband's right to receive speech. Accordingly, the Court will deny the

Defendant's motion to dismiss Counts I and III for failure to state a claim.

IV.Conclusion

In conclusion, for the above stated reasons, the Court shall GRANT the Plaintiff's Motion to Alter or Amend Judgment. Pursuant to this decision, the Court shall DENY the Defendants' Motion to Dismiss for Lack of Standing and Motion to Dismiss for Failure to State a Claim as to Counts I and III of the Plaintiff's complaint. The Court's opinion and order of August 26, 2005 shall in all other respects remain in effect.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: /s/
United States District Judge

December 22, 2005
Date